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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-36

ARTHUR T. DAVIDSON, M. D.,

Petitioner,

against

JAMES KIRBY, GEORGE LEONE, WILLIAM STEIBEL and WILLIAM J. DUNN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Date: October 17, 1975

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Question Presented

Was petitioner, a probationary employee terminated without charges, stigmatized, deprived of his liberty or a property interest such that due process requires reinstatement, or even a hearing.

Statement of the Case

A medical assistance administration was set up as an agency of Suffolk County (New York). A position of Medical Director, jurisdictionally classified competitive, was established and on May 29, 1973, petitioner was appointed provisionally. His duty was to examine physicians' claims for services under a medicare program.

He resided in Westchester County, maintained a medical office in Brooklyn, was attending law school and devoting time to many professional interests and societies. Over 1,000 medicare claims piled up on his desk despite repeated admonition to get on the job, and on October 12, 1973, his supervisor suspended him.

On October 17, 1973, petitioner obtained a show cause order in the Supreme Court (New York), Suffolk County, containing a stay against his termination. On the adjourned return of the motion the restraint was not continued and petitioner was terminated on October 30, 1973. His Article 78 proceeding against several Suffolk County officers was denied and a judgment to that effect was entered January 8, 1974. Petitioner appealed to the Appellate Division, Second Department, but has not perfected the appeal.

On March 19, 1974, service of the summons and complaint in this action was made, and the county officer respondents moved to dismiss. The District Court granted their motion.

The proceeding in the state court was based on civil service law. There petitioner asserted he was not a provisional employee, the county officers failed to conduct an examination to create an eligible list and generally acted capriciously and arbitrarily, and abused their discretion.

Although the state court dismissed the petition on a technicality, it observed that the petition was so lacking in merit that had proper service have been made, the court would have been obliged to dismiss on the law, since in New York a provisional appointment does not ripen into a competitive one.

While an appeal in that case was still pending petitioner commenced this action, asserting jurisdiction under 28 U.S.C. Sect. 1343 and 42 U.S.C. Sect. 1983. The thrust of his complaint was merely that he was never charged

nor afforded an opportunity to reply and that respondents' failure to inform him of the nature of the charges and afford petitioner an opportunity to respond violated his civil rights to due process.

The complaint states petitioner was appointed as Medical Director of the Suffolk County Medical Assistance Program.

He avers he faithfully, fully, and in a highly satisfactory manner performed all the duties of the position.

At the same time he professed himself to be a board-certified general surgeon and assistant clinical professor of surgery at one institution, a cancer research scientist with laboratories at two other institutions, and a fourth year law student.

He claims he was suspended October 24, 1973, by a letter which indicated charges would follow, and terminated from the position six days later.

His grievance is he was never informed of the charges nor given an opportunity to reply and was thereby denied his civil rights as guaranteed by the due process clause of the Fourteenth Amendment.

Before the District Court on the motion to dismiss were facts needed to fill in the obvious voids in the complaint.

The first essential fact is that petitioner was hired as a provisional. He never had permanent civil service status and was subject to immediate discharge.

The second essential fact is that the petitioner, knowing his discharge was imminent, instituted an Article 78 proceeding and obtained an ex parte order enjoining his termination.

It was at the inception of the New York proceeding by order to show cause that the problem of charges arose.

When the respondent Kirby understood that petitioner was not prepared to explain what brought about the office

conditions that existed, and to say that he was prepared to give the needed full time attention the job required, but was, instead, attempting to use the courts to hang on to the job, he would have forthwith fired petitioner but was prevented from doing so because of the temporary restraining order.

Under the circumstances he took advantage of an option available to him; he suspended petitioner effective October 24, 1973. At the same time he terminated petitioner, but specifically made the termination subject to the show cause order.

As it happened, on the adjourned return date of the show cause order the stay was not continued. There was then no necessity to proceed with charges to support the suspension.

On October 30, 1973, petitioner was informed by letter that inasmuch as the stay was not continued his termination was effective as of the close of business on that day and that under the circumstances the suspension of October 24 was withdrawn as academic.

The District Court (EDNY), Judd, J., dismissed the complaint by an order dated June 19, 1974; the Court of Appeals for the Second Circuit affirmed by its order dated April 3, 1975.

Argument

The issue here is narrow. The decisions of the courts below were squarely within the boundaries that have just recently been defined concerning the applicability of the due process clause to public employee dismissals.

POINT I

The decision below was clearly correct.

By his order in the District Court, Judge Judd afforded the petitioner leave to amend his complaint. He declined, and on appeal to the Second Circuit Court of Appeals claimed his dismissal was racially inspired. In his memorandum Judge Judd had specifically noted "Plaintiff does not allege any facts indicating that his dismissal was racially inspired", and the Circuit Court succinctly noted that the "equal protection argument was considered and rejected by [it] in *Russell* v. *Hodges*, 470 F. 2d 212 (2 Cir. 1972)."

Petitioner does not raise the stigma question. Certainly he cannot claim his termination had the effect of depriving him of other employment. It was his "other employment" to an overburdening degree that resulted in his virtual abandonment of his public job and consequent dismissal.

Petitioner dispatches this Court's teaching in *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972) by asserting the ultra-extreme view that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment" (petitioner's brief, p. 9), and asking the Court to expand its definition of a "property interest" accordingly.

That assertion is more of an exercise of the right of free speech than a pronouncement of an established or desirable legal principle.

In *Board of Regents* v. *Roth, supra,* this Court said "it stretches the concept too far to suggest that a person is deprived of a 'liberty' when he simply is not re-hired in one job but remains as free as before to seek another."

The recent refinement in *Goss* v. *Lopez,* —— U.S. ——, 95 S. Ct. 729 (1975), extending the "property" concept to school suspension does not embrace the theory advanced by the petitioner here.

There is no conflict of decision and no important question of federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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